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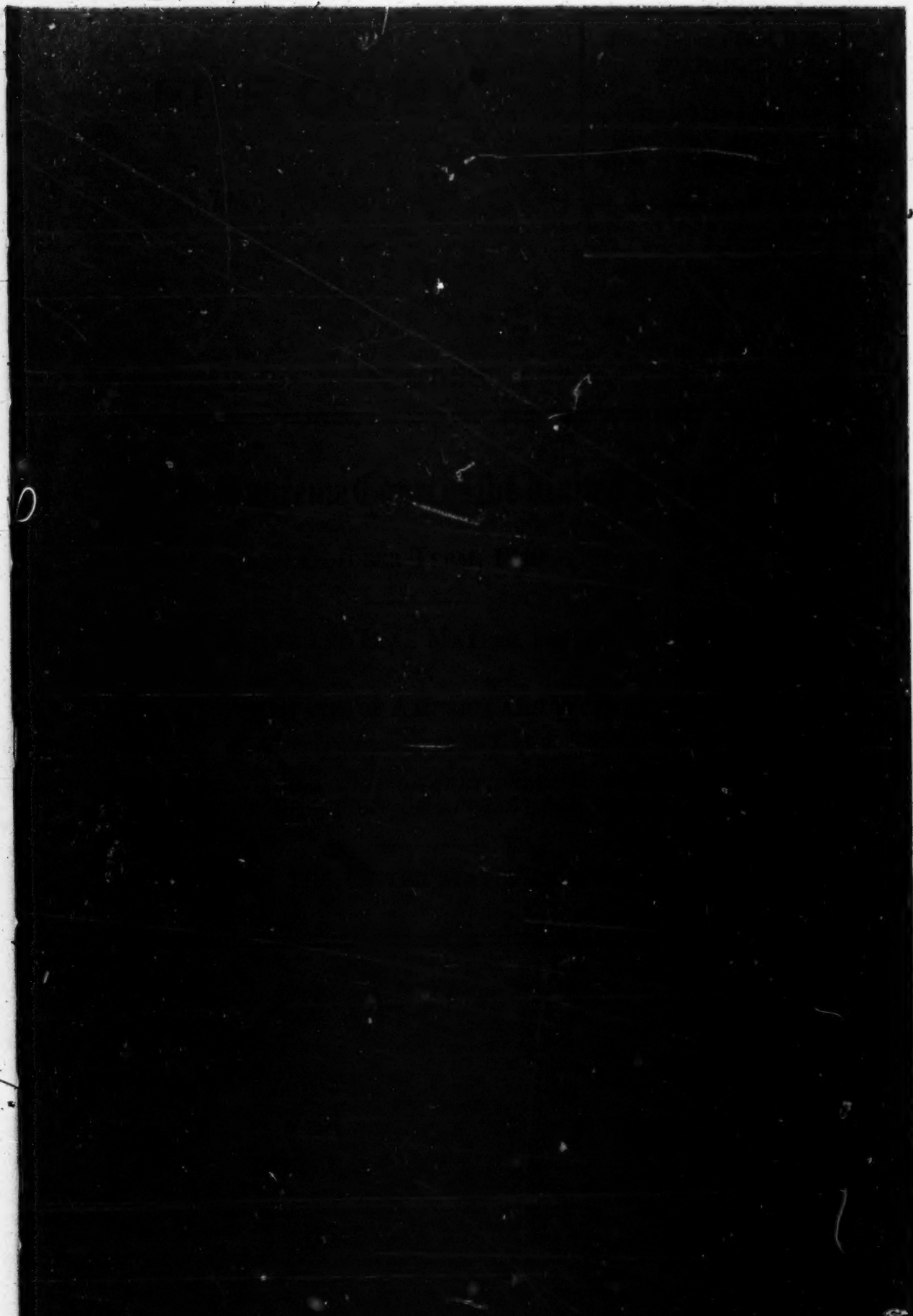

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 558

R. H. NYE AND L. C. MAYERS, PETITIONERS

v.

THE UNITED STATES OF AMERICA AND W. B. GUTHRIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 168–174) is reported in 113 F. (2d) 1006.

JURISDICTION

In our view, the petition for writ of certiorari was not filed in time, with the result that this Court is without jurisdiction. This question is discussed at pp. 6–10, *infra*.

The judgment of the Circuit Court of Appeals was entered August 30, 1940 (R. 174). The petition for writ of certiorari was filed November 7, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Only two of the questions presented by the petition for writ of certiorari (pp. 2–3) are discussed by petitioners:

(1) Whether the District Court lacked jurisdiction of the contempt proceeding because a verifying affidavit was not filed concurrently with the motion for an order to show cause.

(2) Whether the contempt judgment is void because the plaintiff in the suit in connection with which the contempt arose settled that suit subsequent to the contempt judgment.[1]

STATUTE INVOLVED

The pertinent portion of U. S. C., Title 28, Section 385 (Judicial Code, Sec. 268, 36 Stat. 1163) is as follows:

> The said courts [courts of the United States] shall have power * * * to punish, by fine or imprisonment, at the discre-

[1] A question presented but not discussed is whether the petitioners were guilty of contempt. It does not appear what the petitioners contend in this connection. The findings of the District Court (R. 1–6), which the Circuit Court of Appeals said were amply supported by the evidence (R. 169), are set out *in extenso* in the opinion of the appellate court (R. 169–170). That opinion amply demonstrates that the conduct of petitioners in restraining a litigant from the assertion of a valuable claim in a court of justice constituted contempt (R. 172–173).

tion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice * * *.

STATEMENT

The District Court adjudged the petitioners, R. H. Nye and L. C. Mayers, guilty of contempt of court by reason of conduct tending to obstruct the administration of justice (R. 5–6). Nye was ordered to pay a fine of $500 and the costs of the contempt proceeding, including the sum of $500 to W. B. Guthrie, attorney, who, "through whose untiring efforts and at great expense" discovered and brought the contempt to the attention of the court (R. 6), and then prosecuted it. Mayers was ordered to pay a fine of $250 (R. 6). On appeal the judgment of the District Court was unanimously affirmed by the Circuit Court of Appeals for the Fourth Circuit (R. 168–174).

The evidence may be briefly summarized as follows:

The contemptuous conduct occurred in connection with a suit brought in *forma pauperis* in the District Court of the United States for the Middle District of North Carolina by W. H. Elmore, Administrator, against C. T. Council and Germain Bernard, trading as the B. C. Remedy Company, for damages in the amount of $30,000 for the

wrongful death of Elmore's son. W. B. Guthrie was appointed as attorney to represent Elmore in that suit (R. 1).

Nye's daughter was married to the son of defendant C. T. Council (R. 19, 28, 151), and Nye undertook, with the aid of petitioner Mayers, his tenant (R. 81) and quondam contractor (R. 82–83), to have Elmore drop the suit (R. 7, 19, 32, 83, 144, 155). To this end, Mayers, who knew Elmore (R. 19), drove some 60 miles to Elmore's home near Conway, South Carolina (R. 43), to bring him to Nye at Lumberton, North Carolina (R. 46). Mayers found Elmore, an illiterate old man, feeble in mind and body (R. 4, 24, 55, 56, 67), working in a ditch (R. 31) and plied him with liquor (R. 7, 29, 31, 33, 35). Mayers took him to Lumberton without having Elmore see his daughter, with whom he lived (R. 7), and who, Elmore informed Mayers, would not "want" him to go to Lumberton (R. 86). Upon their arrival, Nye put in a long distance call at about 8:00 P. M. for his attorney, Timberlake, who was unable to arrive until the next morning (R. 139). Although Elmore had a son residing in Lumberton (R. 95), he was taken to Nye's home where he and Mayers slept in one bed (R. 33).

Early the next morning Mayers and Elmore had breakfast at Nye's expense (R. 25), and then Nye took Elmore to the office of his attorney, Timberlake (R. 25). Timberlake testified that Nye "ex-

plained the whole thing" and told him "the substance of what he wanted the letter [to the District Judge and to Guthrie] to contain" (R. 88), and that he wanted to get Elmore discharged as administrator (R. 92–A3). Thereupon Timberlake drafted a final account of Elmore's administration (R. 88, 92) and letters to the District Judge and to Guthrie requesting them to dismiss Elmore's suit (R. 88). Nye paid for these services (R. 90) and took Elmore to the office of the Clerk of the Superior Court where the final account was filed and Elmore was discharged as Administrator (R. 7, 26, 41–42), Nye paying the costs (R. 26, 142). Nye registered the letters to Guthrie and the District Judge, paying for the postage and a return receipt addressed to Nye (R. 144–146), and then asked Mayers to drive Elmore home (R. 96). Elmore subsequently testified, at a hearing on a motion to dismiss his action on the ground that he had been discharged as administrator and the estate fully administered, that he was induced to sign the letters and final account while in an intoxicated condition and desired to prosecute his action (R. 7–8).

On motion of Guthrie (R. 13–17), the District Court issued a rule on September 30, 1939, directing Nye and Mayers to show cause why they should not be adjudged in contempt (R. 8). A verifying affidavit was filed by Guthrie on October 7, 1939 (R. 171, Pet. 4). Petitioners appeared in answer to the order on October 30, 1939 (R. 9, 18–28).

After a hearing the District Court held that the conduct of the petitioners was "misbehavior so near to the presence of the court as to obstruct the administration of justice" (R. 6). The District Court found, *inter alia,* that the writing of the letters and the filing of the final account were procured by respondent Nye for the express purpose of preventing the prosecution of the civil action in the Federal court and with intent to obstruct and prevent the trial of the case on its merits in that court; that this conduct had caused a long delay, several hearings, and enormous expense; and "that respondent Meares [Mayers] did furnish liquor to Elmore and got him under his (Meares') control, but Elmore did not remain intoxicated while he signed the letters and false final account; but he was completely under the control and domination of Meares and Nye; that neither of the respondents paid Elmore any sum or promised him any sum whatsoever, to get the case stopped" (R. 4, 5–6).

ARGUMENT

Petitioners' contentions are, we submit, without merit. In addition, their petition here was filed too late.

1. If the contempt in question is a criminal contempt and the Criminal Appeals Rules promulgated by this Court on May 7, 1934, are applicable,[2]

[2] Rule XI of such Rules provides that "Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made

it is clear that the petition for writ of certiorari in this Court was not filed in time.[3] If, however, the contempt was a civil contempt, the petition for writ of certiorari was timely (Section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. C., Title 28, Sec. 350).[4]

It would seem clear that the contempt in question was a criminal contempt. Petitioners were found guilty of "misbehavior so near to the pres-

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within thirty (30) days after the entry of the udgment of that court."

[3] The judgment of the Circuit Court of Appeals was entered August 30, 1940 (R. 174). No petition for rehearing suspending the finality of that judgment was entered (see *Morse* v. *United States*, 270 U. S. 151, 153–154), and the petition for writ of certiorari was not filed in this Court until November 7, 1940, 58 days after the entry of the judgment of the Circuit Court of Appeals, excluding Sundays and legal holidays.

[4] Likewise, if the contempt involved is a criminal one, the appeal to the Circuit Court of Appeals was not in time. Rule III of the Criminal Appeals Rules provides that "An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made * * * the appeal may be taken within five (5) days after entry of the order denying the motion." The certified transcript of record on file in this Court does not contain any motion for a new trial. The combined findings and order of the District Court adjudging petitioners in contempt was filed on February 8, 1940 (R. 1–6; certified transcript on file in this Court, pp. 41–45). The notice of appeal from this order was not filed in the District Court by the petitioners until March 15, 1940, 30 days after the District Court entered its order (certified transcript, p. 54), excluding Sundays and legal holidays. If, however, the contempt was a civil contempt, the appeal was taken in time (Section 8 (e) of the Act of February 13, 1925; U. S. C., Title 28, Sec. 230).

ence of the court as to obstruct the administration of justice" (R. 6). This phrase was patterned on the statutory language of U. S. C., Title 28, Section 385 (*supra*, pp. 2–3). A civil contempt cannot be based upon this portion of Section 385 (*In re Sixth & Wisconsin Tower, Inc.*, 108 F. (2d) 538, 540 (C. C. A. 7th)), which plainly involves punishment for an affront to the authority of the court rather than remedial punishment for the benefit of the complainant. A contempt is civil solely "when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." (*McCrone* v. *United States*, 307 U. S. 61, 64, and cases cited.) The motion for the issuance of a rule to show cause was not made by the plaintiff in the main cause and did not ask for damages or other relief for the plaintiff. And no damages or other relief was awarded to him. Guthrie asked for the rule to show cause apparently as an officer of the court and requested the court, *inter alia*, to direct the United States Attorney to investigate the question whether Nye and Mayers conspired to defeat the administration of justice (R. 17). Nye and Mayers were ordered to pay fines which went to the United States and not to the complainant in the principal suit (*In re Fletcher*, 107 F. (2d) 666, 668 (App. D. C.)), and Nye was ordered to pay the costs of the proceeding, including the sum of $500 to Guthrie, who, through his "untiring efforts and at great expense discovered and brought to the at-

tention of the court the contempt for its authority" (R. 6). If, as is apparent, the proceeding was designed to punish the obstruction of the administration of justice, its criminal nature was not affected by the fact that the moving and other papers were not entitled in the form usually utilized in the case of criminal contempt (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 446), or because the petitioner Nye was directed to pay the costs of the proceeding, including counsel fees (*Oates* v. *United States*, 233 Fed. 201, 207 (C. C. A. 4th); *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577, 578 (C. C. A. 9th)).

Petitioners rely upon an "apparent" conflict between the decision below and *In re Sixth & Wisconsin Tower, Inc., supra,* as a reason for allowance of the writ. In that case, conceded by the parties to be a civil contempt (p. 540), the appellee asked for damages because appellant sent letters to bondholders which were designed to influence them to withhold consent to a plan of reorganization, and he urged that this conduct of appellant amounted to misbehavior "such as to obstruct the administration of justice." The court held that the quoted language had no application to a civil contempt. There is plainly no conflict between that decision and the decision below.

If, as we submit, the contempt was criminal, the Criminal Appeals Rules, with their time limitations upon appeals and petitions for writs of cer-

tiorari, should be deemed to apply. The Criminal Appeals Rules were specifically held applicable to criminal contempts in *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577, and the Circuit Court of Appeals for the Ninth Circuit dismissed an appeal in such a case which was not taken within the five days permitted by Rule III of those Rules.

This decision finds support in *United States* v. *Goldman*, 277 U. S. 229, 235–236, where it was held that an appeal to this Court would lie in a criminal contempt case under that portion of the Criminal Appeals Act which provides that a direct appeal may be taken "in all criminal cases, in the following instances, to wit: * * * From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy" (U. S. C., Title 18, Sec. 682).

Again, *Gompers* v. *United States*, 233 U. S. 604, held applicable to a prosecution for criminal contempt the general statute of limitations with reference to criminal offenses, providing that "no person shall be prosecuted, tried, or punished for any offense, not capital, except * * *, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed" (p. 607).

2. Assuming that this Court has jurisdiction, there is clearly no merit in petitioner's contention that the District Court was without jurisdiction because a verifying affidavit was not filed concurrently with the motion for an order to show cause.

It has been held that an affidavit is not required in a contempt proceeding under Section 385. *In re Fletcher,* 107 F. (2d) 666, 668 (App. D. C.), certiorari denied, 309 U. S. 664; *Bowles* v. *United States,* 50 F. (2d) 848, 851 (C. C. A. 4th), certiorari denied, 284 U. S. 648. Petitioners were, of course, entitled to be informed of the charges against them so that they could prepare their defense. But this information was set forth in ample detail in the motion for the order to show cause (R. 13–16),[5] and any technical deficiency was made good by the verifying affidavit filed one week later, before petitioners had filed their answers. Moreover, no motion was made to dismiss, on the ground that the omission simultaneously to file the verifying affidavit and the motion went to the jurisdiction of the court, until after the petitioners had put in their evidence (R. 11, 172). Under these circumstances the Circuit Court of Appeals properly held that the petitioners "waived the defect by their participation in the proceeding, even if it be supposed that the filing of an affidavit on October 7 was too late" (R. 172). See *Sona* v. *Aluminum Castings Co.,* 214 Fed. 936, 940 (C. C. A. 6th), and authorities there cited.

[5] The motion requested the issuance of an order to show cause only against Nye (R. 17), but the order issued against both Nye and Mayers and stated that Guthrie had moved for an order against both (R. 8). And Mayers filed an answer stating that it was in response to a motion filed by Guthrie (R. 18).

3. Petitioners also contend that Elmore's settlement of the main suit (see R. 173–174) renders the judgment in the contempt proceeding void. This contention might find room in a civil contempt proceeding, but a criminal contempt proceeding, such as the instant one, is unaffected by a settlement. *Gompers* v. *Bucks Stove & Range Co., supra* (p. 451).

CONCLUSION

The petition for writ of certiorari was not timely filed. The petition should, in any event, be denied because the case was correctly decided below, and petitioners present neither a conflict of decisions nor a question of general importance.

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